



Compass Chambers

Duties of Roads Authorities – recent cases

Robert Milligan QC

Introduction

- The willingness of the courts to impose liability on local authorities generally and roads authorities in particular has waxed and waned over the last 40 years
- That willingness peaked in the early 1980s with the case of *Anns* but has been in fairly steady retreat ever since
- A decade of austerity has reinforced that trend

Pure Omissions

- As a matter of generality, the common law does not impose duties on local authorities for pure omissions
- *Stovin v Wise* [1996] AC 923 at 943-946G; *Mitchell v Glasgow City Council* 2009 SC (HL) 21 at paragraphs [39]-[40]; *A J Allan (Blairnyle) Ltd v Strathclyde Fire Board* 2016 SLT 253 at paragraphs [26]-[29]). Where the local authority has not actually created the risk, there is in general no duty to remove it or warn of it.

Acts and omissions — positive acts

- On both sides of the border, there is a common law duty on roads authorities not to create hazards on or even close to the highway.
- This duty extends to anyone who creates a hazard on the highway and is not limited to roads authorities.

Robinson v Chief Constable of West Yorkshire Police [2018] 2 WLR 595

- The liability of public authorities is governed by the same principles that apply to private bodies and individuals (paragraphs 32 and 34)
- Individuals and private bodies are not liable for pure omissions e.g. warning a blind man he is about to walk off a cliff
- Equally, they are not generally liable for the acts of third parties e.g. *Mitchell*

However, that has not always been recognised in Scotland

- *MacDonald v Aberdeenshire Council* 2014 SC 114 per Lady Paton:

“ [37] As for the question of ‘omission’ and ‘commission’ (or misfeasance and non-feasance): as was pointed out by Lord Hamilton in *Gibson v Orr* (p 435H): ‘[W]here a relationship does pre-exist, whether with an individual or with a limited group of persons, the distinction between acts and omissions becomes less important.’

[38] Similarly Lord Macphail in *Burnett v Grampian Fire and Rescue Service* (para 34) stated his views on the issue as follows:

‘In my opinion the law of Scotland does not draw a distinction between acts and omissions comparable to that which appears to exist in the English law of tort between misfeasance and non-feasance.’



MacDonald

- [39] I agree. In any event, in the present case, the roads authority (the defenders) have chosen to exercise their statutory powers by making the roads at the crossroads available for public use, devising a system of traffic flow priority, installing road signs and painting lines on the road. In such circumstances, even if the English tort law approach were to be applicable, I would not be prepared to accept the submission that the pursuer's case against the defenders must be viewed as one of pure 'omission' rather than 'commission', resulting in the case being irrelevant for that reason. I remain of the view that the question of the existence of a duty of care depends upon the particular facts of each case, and not upon the sometimes rather artificial categorisation of misfeasance or non-feasance.

Statutory powers and duties

- where a statute grants powers to a local authority, it cannot be inferred that there is a corresponding duty to utilise those powers,
- if the authority uses those powers in such a way that a danger is caused, they will be liable for that danger.
- *Stovin* 946-958; *Gorringe* [17]-[36], [76]; *Hallet* pp 9-10

Reasonable foreseeability of injury

- A fundamental pre-requisite for the imposition of a duty of care
- Necessary but not sufficient on its own
- There must also be a sufficient degree of proximity between the parties (*Mitchell v Glasgow City Council* 2009 SC (HL) 21 paragraphs 15 - 16).

Proximity

- In this context, this means an assumption of responsibility
- *Murray v Nicholls; Gorringe v Calderdale Metropolitan Borough Council* at para 17
- *Gibson v Orr* 1999 SC 420

Charlesworth & Percy on Negligence (13th Edition)

“It is clear that the mere assumption of a public office or position, coupled with a power to intervene, is no sufficient basis for a duty to take care in private law. Rather, consistently with general principle, there needs to be conduct inducing reliance, or close control over, or a specific assumption of responsibility in relation to, the particular risk of harm or the person that caused the harm. And in all cases it is necessary to consider the proximity of the connection or relationship between the defendant public body and the claimant. There needs to be an assumed responsibility which brings about a special, proximate, relationship between the defendant body and the person affected by its failure to act. There follow some examples falling either side of the line.”

Michael v Chief Constable of South Wales [2015] AC 1732

- Important distinction between public law duty to provide a service and private law duty to provide compensation for failure to provide that service
- see paragraphs [110] to [111], [114] (per Lord Toulson, with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed) and [191] (per Baroness Hale).

The reasonable road user

- Roads authorities are entitled to assume that road users will exercise reasonable care
- *Sandhar v Department of Transport* [2005] 1 WLR 1632 at paragraph 43; *Stovin* at 958D-E; *Gorringe* at para 10
- *MacDonald* at para 63:

“A roads authority is liable in negligence at common law for any failure to deal with a hazard that exists on the roads under its control. A ‘hazard’ for this purpose is something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care.”

Bowes v Highland Council 2017 SLT 749

- Qualification to that rule
- Para [29]: “It was also argued by the defender that a parapet is not designed for careful road users, rather it is designed for drivers who are at fault. I don’t agree with this submission. A parapet may indeed come to the aid of drivers at fault but equally it could aid drivers who are not at fault who, for example, have had a heart attack at the wheel and lost consciousness, or who have been shunted from the rear into the parapet. There are many more such examples.”

A J Allan (Blairnyle) Ltd v Strathclyde Fire Board 2016 SLT 253

- Important case for recognising:
- (1) *Stovin* is applicable in Scotland as well as England
- (2) the importance of the distinction between acts and pure omissions. Duty is to not make things worse.
- Different approaches to cases such as *Gibson*

Lady Paton

- Fully endorsed the act/omission distinction and held that cases like *Duff*, *Burnett* and *Gibson*
- See paragraph 26 and paragraphs 33 to 36
- *Gibson* may have reached the right conclusion, but for the wrong reasons

Lady Dorrian

- Agreed that *Burnett* and *Duff* were wrong and failed to recognise act/omission dichotomy
- More cautious about the status of *Gibson*
- “Gibson may not unreasonably be analysed as a case where their taking control of and then abandoning a known hazard was at least analogous with a situation where the authority created the damage or made the situation worse” (para 50)

Lord Drummond Young

- Accepted that there was no duty on the fire brigade, but made 2 radical suggestions:
 - (1) roads authorities were in a different position as they had greater control over the situation (para 62, point 2 and para 91)
 - (2) there may be a different duty imposed in relation to personal injury than in relation to property damage (para 95-96)



Snow and ice

- *Morton v West Lothian Council* 2006 Rep LR 7 – Lord Glennie at [50]-[52]
- *Rainford v Aberdeenshire Council* 2007 Rep LR 126 – Lord Reed at [64]-[67]
- *MacDonald* – Lord Drummond Young:

“[70] In relation to snow and ice, I do not think that it is necessary to consider the details of the English case law. On the traditional Scottish approach, any action against the roads authority at common law will almost inevitably fail, for two reasons. First, in nearly all such cases there is no hazard, in the sense described above. Snow is obvious, and any driver exercising reasonable skill and care will modify his or her driving accordingly. So far as ice is concerned, a careful driver will obviously be aware of low temperatures and will in consequence drive in such a way as to minimise the risk of skidding on black ice. Secondly, it will almost invariably be impossible to state that the roads authority ought to have treated the particular *locus* of the pursuer's accident.”

Standard of care

- *GENER v Hart* [2003] EWHC 2450 (QB)
- Paragraph 49:
- “It then becomes a matter for the professional judgment of highway and bridge designers and engineers to determine what the length of the approach safety fencing or barrier should be. “

Dewar v Scottish Borders Council [2017]

CSOH 68

- ... In *MacDonald v Aberdeenshire Council* 2014 SC 114 the Inner House held that for a roads authority to be liable, an injury must be caused by a hazard that would create a significant risk of an accident to a careful road user and the authority must be at fault in dealing with the hazard. The second part of these requirements means that the pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it; the hazard must be apparent to a competent roads engineer.

Bowes v Highland Council

- Did not accept this test as appropriate
- [30] “...However, the tripartite test set out in *Hunter v Hanley* , supra, by Lord President (Clyde) at 1955 S.C., p.206; 1955 S.L.T., p.217 is clearly directed at the issue of professional negligence and not whether a roads authority is negligent for failing to deal with a hazard.”

Summary

- How do we reconcile *MacDonald* with *Allan*?
- Lord Drummond Young suggests it is a question of control – however that is a matter of fact
- Current law very confused
- Reclaiming motion in *Bowes* due in April. 5 judges



Compass Chambers

Contact

Compass Chambers

Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Your Name Robert Milligan QC

Mobile:

Robert.Milligan@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com